IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPLICATION NO. 63/01 OF 2020

MAULID JUMA BAKARI @ DAMU MBAYA .... APPLICANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Application for review from the Decision of the Court of Appeal of Tanzania at Dar es Salaam)

(Lila, Mwangesi, Sehel, JJ.A.)

dated the 13th day of July, 2020
in
Criminal Appeal No. 58 of 2018

RULING OF THE COURT

9th & 29th July, 2021

LEVIRA, J.A.:

This is an application for review of the Judgment of the Court in Criminal Appeal No. 58 of 2018 which dismissed the applicant's appeal against the decision of the High Court in Criminal Appeal No. 102 of 2012. The application is brought under Rule 66 (1) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and section 4 (4) of the Appellant Jurisdiction Act Cap 141 R.E. 2019 (the AJA) and is supported by the affidavit of the applicant. In the Notice of Motion, the applicant has raised three grounds for review as follows:

1. *That the decision was based on manifest errors on the face of the record because however the Honourable justice (sic) of the Court tried to solve the contravention of section 228 (1) of the CPA, similarly, contrary to the law, the content of the memorandum was not read over and explained to the applicant which resulted a miscarriage of justice.*

2. *That the decision was based on manifest errors on the face of the record that the Honourable justice of the Court failed to realize that the visual identification evidence of the said identifying prosecution witnesses (PW1 and PW2) was unsatisfactory, unreliable, uncredible and not watertight.*

3. *That a part applicant (sic) was wrongly deprived of an opportunity to be heard this is so because, during the appeal hearing the Honourable Justice (sic) of the Court infringed the applicant's right to make a rejoinder after the respondent to oppose the applicant's appeal regarding the visual identification which injustice (sic) and prejudiced the applicant.*

In paragraphs 1 and 2 of the affidavit, the applicant avers that he was charged with and convicted of the offence of armed robbery in the District Court of Kinondoni and he unsuccessfully appealed to the High Court in Criminal Appeal No. 102 of 2012. In paragraph 3, it is the

applicant's deposition that he was aggrieved by the decision of the first appellate court and thus he again unsuccessfully appealed to the Court in Criminal Appeal No. 58 of 2018. The applicant is not satisfied with the impugned decision of the Court and in paragraph 4, he contends that the same contravened section 228(1) of the Criminal Procedure Act, Cap 20 R.E. 2019 (the CPA). The applicant further contends that he was denied the right to be heard as the Court failed to give him an opportunity to make a rejoinder.

The application is opposed by the respondent Republic through the Affidavit in Reply of Ms. Imelda Mushi, learned State Attorney. Ms. Mushi disputed all the grounds raised by the applicant.

At the hearing of the application, the applicant appeared in person, unrepresented, whereas the respondent Republic was represented by Ms. Dhamiri Masinde, learned State Attorney.

The applicant adopted the written submissions which he had filed together with the Notice of Motion and affidavit as part of his oral submission before us. Thereafter, he preferred to hear from the learned State Attorney as he reserved his right to make a rejoinder.

In reply Ms. Masinde opposed the application arguing that the application does not comply with the requirements of Rule 66 (1) (a) – (e) of the Rules due to the following reasons: That all the three grounds of review as described in paragraphs 4, 5 and 6 of the supporting affidavit are grounds of appeal not review. This, she said, is because all the errors stated by the applicant are not apparent in the impugned judgment. She cited the decisions of the Court in **Ex. F. 5842 D/C Mahudu v. Republic,** Criminal Application No. 40/06 of 2019 (unreported) and **Chandrakant Joshubhai Patel v. Republic** [2004] TLR 218 stating that, an error must be apparent on the face of the record, but it is not the case herein.

Ms. Masinde submitted in respect of the first ground of review to the effect that it was raised as a ground of appeal and determined by the Court at page 21 of the impugned decision. She stated further that, the complaint in the second ground of review regarding PW1 and PW2 visual identification was also among the grounds of appeal raised and determined by the Court. Therefore, she argued, the applicant cannot raise them again as grounds for review and thus urged us to dismiss them.

Arguing on the third ground of review, Ms. Masinde partly opposed the applicant's complaint to the extent that the record is silent whether or not he was given the right to make a rejoinder in relation to visual identification. She referred us to page 17 of the impugned decision and argued that, although it is not indicated in that page that the applicant got an opportunity to make a rejoinder, that fact alone does not amount to a complete denial of the right to be heard. In addition, she argued that the applicant was not prejudiced because there was nothing new argued by the respondent except the reply to the grounds of appeal. She thus urged us to find this ground unmerited and dismiss the entire application for lacking in merits.

In rejoinder, the applicant complained that the victim did not identify him. He added that during hearing of his appeal before the Court he was not accorded the right to make a rejoinder. He said, he tried to raise up his hand so as to be given chance to make a rejoinder but the Court refused to allow him to do so, saying that he should wait for the decision of the Court. In addition, he prayed for the Court to consider the period of time he stayed in custody before being convicted and sentenced. He concluded by urging us to grant the application.

Having considered the submissions by the parties and the entire record of the application, we shall now determine whether or not the application is merited. We find it apposite at the outset to reproduce the provisions of Rule 66 (1) (a) and (b) of the Rules under which the current application is brought. It reads:

> *"66.- (1) The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds -*
>
> *(a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice;*
>
> *(b) a party was wrongly deprived of an opportunity to be heard."*

The wording of the above quoted Rule is clear that review is limited in scope to the grounds stated thereunder. The applicant's notice of motion has been brought under paragraphs (a) and (b) of the above quoted provision; meaning, **first,** that there is an error on the face of the impugned decision which has resulted in miscarriage of justice; and **second,** that the applicant was deprived of the right to be heard. In the circumstances, we need to ascertain whether or not the complained errors do exist and were clearly demonstrated by the applicant (if the answer is in the affirmative), whether the applicant was prejudiced.

To start with a manifest error on the face of record, the law is settled that such an error must be obvious and easily identifiable by anyone reading the decision. It neither requires long arguments nor re-evaluation of evidence. We are guided in this position by our decision in **Chandrakant Joshubhai Patel** (supra) that:

> *"An error on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not* ***something which can be established by a long drawn process of reasoning on points on*** *which there may conceivably be two opinions ..."* [Emphasis added].

We need to emphasise here that the purpose of review is to address irregularities of a decision which have caused injustice to a party. Therefore, it is not an appeal avenue open to the unsatisfied party with the decision of the Court - See **Charles Barnabas v. Republic,** Criminal Application No. 13 of 2009 (unreported).

In his written submissions presented before us, the applicant expounded the first ground of this review to the effect that:

> *"There were irregularities in the trial court proceedings at page 4 of the record of appeal shows that, the proceedings were conducted irregularly in the trial court. The record shows*

that on 18.08.2010 the applicant and his co-accused were brought to the court for the first time but illegally and un- procudure (sic) the charge sheet wasn't read over to the accused persons as the mandatory of law required this is contrary to section 228 (1) of the CPA cap 20 R.E. 2002 and thus cannot said to be duly proved under section 229 (1) of the CPA cap 20 R.E. 2002."

We wish to note that, the applicant's complaint in this ground was raised as a ground during hearing of his appeal and the Court addressed it at page 21 of its decision as follows:

"Somehow connected to the above ground is the complaint that the charge was not read over to the appellants hence violating the provisions of section 228 (1) of the CPA. That section enjoins the trial magistrate to ensure that the substance of the charge is stated to the accused and is asked to plead thereto (admit or deny). Much as we agree with the appellants that the record of appeal supplied to them did not indicate that the substance of the charge were stated to the appellants and required to plead whether they admit or deny the truth of the charge as mandatorily required under section 228 (1) of the CPA, our perusal of the original record revealed

that the proceedings of the trial court prior to 18/8/2010 which were conducted by Makabwa RM before whom the appellants were first, were not typed. The anomaly was caused by such proceedings being left loose hence easy to be misplaced."

The above excerpt is a clear evidence that this ground which the appellant is trying to raise now was a ground of appeal. The Court delt with it at length and in any case, it cannot be raised again before the Court through a backdoor as a ground for review. In essence, it is not a ground for review, so to speak. In similar circumstances, the Court in **Mirumbe Elias @ Mwita v. Republic,** Criminal Application No. 4 of 2015 (unreported) at page 5 held that, a review should not be utilised as a backdoor method to unsuccessful litigants to re-ague their case. Seeking re-appraisal of the entire evidence on record for finding the error is tantamount to the exercise of the appellate jurisdiction which is not permissible.

In the same vein, it is our observation that the applicant has failed to show the alleged error on the face of the impugned decision. We agree with Ms. Masinde that there is no error apparent on the face of record established by the applicant in this ground. For that reason, we

find the first ground for review presented by the applicant misconceived and thus bound to fail.

In the second ground of review, the main complaint is that the visual identification evidence of PW1 and PW2 was unsatisfactory, unreliable, incredible and not watertight. We as well, agree with Ms. Masinde that this is another ground of appeal and not for review. The same was raised and determined by the Court. We need to emphasise here that, issues regarding the evidence of witnesses cannot be raised as grounds for review as they will require going back to the record to re-evaluate what they said, a process which does not fall under the confines of Rule 66 (1) of the Rules. We therefore find that the second ground of review is also misconceived.

In the third ground, the applicant complains that he was wrongly deprived of an opportunity to be heard by the Court as he was not given an opportunity to make a rejoinder. The applicant's bone of contention in respect of this ground is that at the hearing of his appeal before the Court, he tried to raise up his hand so as to be allowed to make a rejoinder after reply submission by the counsel for the respondent but the Court refused to give him that opportunity. We note that although the applicant made such a serious allegation orally before us, he never

indicated the same in his affidavit in support of the application. On her part, Ms. Masinde agreed that the record is silent as to whether the applicant was given the opportunity to make a rejoinder. However, she argued, even if it is true, he was not prejudiced because the respondent only replied to the grounds of appeal.

We took time to peruse the impugned decision of the Court. At page 17 the Court having finished to narrate what was submitted by Ms. Ally, counsel for the respondent, proceeded to state that:

> *"Reading the grounds of appeal comprised in the memorandum of appeal and supplementary memorandum of appeal as a whole it is clear to us, that the following substantive complaints are raised."*

From the above excerpt, nothing indicates that the applicant made a rejoinder. However, in our considered view since we do not have concrete evidence that the applicant attempted to request the Court for such an opportunity to make a rejoinder but was refused, we are unable to work on such bare assessions because it is not established that indeed he was deliberately denied such right. It is very unfortunate that even in written submissions filed by the applicant, there is nothing

stated regarding the third ground and in particular, the allegations against the Court.

Our close reading of the third ground of review shows that the applicant intended to challenge the issue of identification which has already been covered in the second ground. Suffices here to state that the impugned decision of the Court covers at length the issue of identification and identifying witnesses from page 23 to 36. As we stated while dealing with the second ground, issues concerning analysis of evidence are not subject of review. Parties should always be reminded by the Court's words in **Peter Ng'homango v. Gerson A. K. Mwanga**, Civil Application No. 33 of 2002 (unreported) quoted in **Ex. F. 5842 D/C Maduhu** (supra) at page 10 that:

> *"It is no gainsaying that no judgment, however elaborate it may be can satisfy each of the parties involved to the full extent. There may be errors or inadequacies here and there in the judgment these errors would only justify a review of the Court's judgment* ***if it is shown that the errors are obvious and patent.***"
>
> [Emphasis added].

In the light of the above decisions, we entertain no doubt that in all the three grounds of review presented before us, the applicant has failed to

show apparent errors to justify invocation of our review powers in terms of Rule 66 (1) of the Rules. Consequently, we dismiss the entire application.

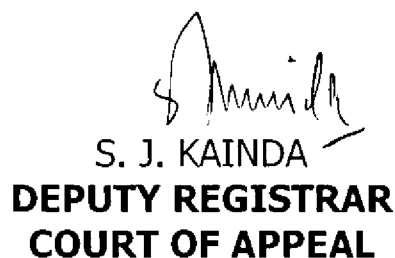
DATED at **DAR ES SALAAM** this 27th day of July, 2021.

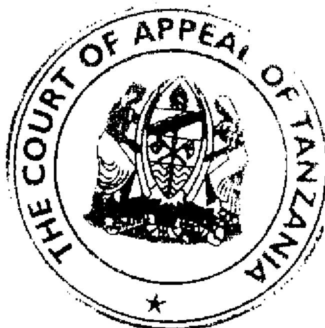
A. G. MWARIJA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. MWAMPASHI
JUSTICE OF APPEAL

The ruling delivered this 29th day of July, 2021 in the presence of Appellant via Video Conference from Ukonga Prison and Ms. Imelda Mushi, State Attorney for the Respondent is hereby certified as a true copy of the original.





S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL